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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

MOHAMMAD KHAN AND ERUM SYEDA,
Petitioners

v.

JOHN D. ASHCROFT,
UNITED STATES ATTORNEY GENERAL, ET AL.
Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Courts of Appeals have jurisdiction to review denials of motions to reopen applications for suspension of deportation under Immigration and Nationality Act § 244, 8 U.S.C. § 1254, consistent with the Ninth Circuit's ruling in *Arrozal v. INS*, 159 F.3d 429 (9th Cir. 1998).

2. Whether the Seventh Circuit Court of Appeals should have transferred the Petition for Review to the Court of Appeals for the Ninth Circuit where venue was proper under 8 U.S.C. § 1252(b)(2).

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OPINIONS BELOW

The orders of the Seventh Circuit U.S. Court of Appeals (App. A1-A5) are unpublished. The opinions of the Board of Immigration Appeals (App. A7-A14) are unreported.

JURISDICTION

The order of the court of appeals was entered on November 13, 2003 (App A4). Petitioners' motion to reconsider was denied on December 31, 2003 (App. A3). This jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

8 U.S.C. § 1254(a), repealed by Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Sept. 30, 1996, P.L. 104-208, Div C, Title III, Subtitle A, § 308(b)(7), 110 Stat. 3009-615 (effective as provided by § 309(a) of such Act, which appears as 8 USCS § 1101 note) provides that:

> (a) Adjustment of status for permanent residence; As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 1251(a)(4)(D) of this title) who applies to the Attorney General for suspension of deportation and-- (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in

> the United States for a continuous period of not less than seven years immediately preceding the date of application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;...

See Appendix for text:

8 U.S.C. § 1252, as amended by IIRIRA § 306. Judicial review of orders of removal.

STATEMENT

Petitioners, husband and wife, are natives and citizens of Pakistan. Male petitioner, Mohammad Khan, entered the United States on or about March 22, 1986, at the age of twenty-four, as a nonimmigrant student.[1] Female petitioner, Erum Syeda, entered the United States on or about August 9, 1989, at the age of sixteen as a nonimmigrant visitor for pleasure. On January 8, 1997, the Immigration and Naturalization Service (INS) served on petitioners an Order to Show Cause (OSC), charging

---

[1] Counsel of Record and the United States Court of Appeals for the Seventh Circuit did not receive the Certified Administrative Record from the U.S. Department of Justice, Civil Division, Office of Immigration Litigation, in this instant case. All relevant materials currently in Counsel's possession have been included in the Appendix.

petitioners with deportability. Male petitioner was charged under Section 241(a)(1)(c)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1), for failing to comply with the conditions of the nonimmigrant status under which he was admitted. Female petitioner was charged under INA § 241(a)(1)(B) for remaining in the United States longer than permitted. At the time that the INS served the OSC, male petitioner and female petitioners had resided continuously in the United States for eleven years and seven years respectively.

Petitioners filed their applications for asylum and suspension of deportation under INA §244(a)(1), 8 U.S.C. 1254(a)(1) (1994). Under INA Section 244(a)(1), the Attorney General had the authority to suspend the deportation of an alien who (as pertinent here) had been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application for suspension, who proved that during all of that period he was a person of good moral character, and whose deportation would result in extreme hardship to the alien or to his citizen or lawful permanent resident alien spouse, parent, or child. *See* 8 U.S.C. § 1254(a)(1) (1994, repealed).

On December 1, 1998, the immigration judge (IJ) in Los Angeles, California, denied petitioners' applications for asylum and suspension of deportation, but granted them voluntary departure. The IJ conceded that petitioners had met their burden of proof establishing seven years continuous physical presence prior to the serving of the OSC, and found them both to be persons of good moral character. However, the IJ adversely determined that

petitioners' deportation would not result in "extreme hardship" if forced to return to Pakistan. The IJ granted petitioners voluntary departure, and in the alternative ordered petitioners deported to Pakistan.

Petitioners appealed from the IJ's decision to the Board of Immigration Appeals (BIA). On January 22, 2003, the BIA summarily denied petitioners' appeal. (A10-A14). Petitioners subsequently filed a motion to reopen with the BIA, requesting that the BIA reconsider its decision or remand proceedings for further consideration on the new evidence submitted. On June 2, 2003, the BIA denied petitioners' motion stating only that "[w]e have considered the respondent's motion papers but we do not find that reopening of the proceedings is warranted." (A7-A9).

Petitioners filed a Petition for Review with the Seventh Circuit Court of Appeals. During the pendency of the Petition for Review, petitioners received a baggage and board order from the INS dated August 25, 2003, stating that petitioners were to report for deportation on September 25, 2003. Petitioners filed a Motion for Stay of Removal on September 23, 2003. The court ordered the petitioners deportation temporarily stayed pending the resolution of the motion. (A6). The respondents filed a Motion to Dismiss and in the Alternative to Transfer on October 9, 2003. In an order dated November 13, 2003, a three judge panel narrowly ruled to deny petitioners' stay of removal, and dismiss their Petition for Review, citing that courts of appeals "...do not have jurisdiction to review discretionary denials of applications for suspension of deportation." (A4-A5) Judge Ilana Rovner dissented and voted to transfer the

petitioners' appeal to the Court of Appeals for the Ninth Circuit. (A5)

ARGUMENT

Petitioners argue that the court of appeals erred in concluding that they were barred from seeking judicial review of the BIA's dismissal of their motion to reopen. The court of appeals improperly dismissed the petitioners' appeal, stating that it was without jurisdiction to consider the Petition for Review citing *Plich v. INS,* 129 F.3d 969 (7th Cir. 1997). However, petitioners sought review of an order denying their motion to reopen, and the courts of appeals do have jurisdiction to consider whether or not the BIA abused its discretion in denying the motion wherein the underlying order is not barred from judicial review. Petitioners contend that the Seventh Circuits decision to dismiss their petition for review relying on *Plich v. INS* conflicts with the decision of the Ninth Circuit Court of Appeals in *Arrozal v. INS,* 159 F.3d 429, 431 (9th Cir. 1998).

Moreover, if the Seventh Circuit Court of Appeals found that it did not have jurisdiction to consider the matter, the case should have been transferred to the Court of Appeals for the Ninth Circuit, where jurisdiction was proper under INA § 309(c)(4)(D), 8 U.S.C. § 1252(b)(2), as "the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge completed the proceedings," and as argued by the government's attorney in their Motion to Dismiss and in the Alternative to Transfer.

Furthermore, this case presents a suitable vehicle for resolution of these issues. Further review is therefore warranted.

I. Suspension of Deportation

Congress enacted 8 U.S.C § 1254 for purpose of granting to Attorney General discretion to ameliorate hardship and injustice (decided under former 8 U.S.C § 1254 [repealed]). *Moon Ho Kim v. INS*, 168 US App DC 283, 514 F2d 179 (1975). Statutory provisions relating to suspension of deportation are designed to ameliorate drastic consequences of orders of deportation (decided under former 8 U.S.C. § 1254 [repealed]). *Fong v. INS,* 308 F2d 191 (1962). To be eligible for suspension of deportation, alien must prove: (1) continuous physical presence in United States for immediately preceding 7 years, (2) good moral character, and (3) extreme hardship to himself or to his spouse, parent, or child, who is United States citizen or lawful permanent resident. *Jong Shik Choe v. INS,* 597 F2d 16 (9th Cir. 1979).

Under 8 U.S.C. § 1254(a)(1), factors which support finding of extreme hardship entitling alien to suspension of deportation include (1) alien's contribution to his community, (2) effects of alien's separation from family, including extreme hardship caused to alien's citizen child by alien's deportation, and (3) economic hardship to alien (decided under former 8 U.S.C. § 1254(a)(1) [repealed]). *Villena v. INS*, 622 F2d 1352 (9th Cir. 1980). The BIA clearly abused its discretion in refusing petitioners' motion

to reopen, because the BIA did not consider every hardship factor alleged by petitioners.

II. Judicial Review

There are three provisions of IIRIRA, now codified at 8 U.S.C. §§1252(a)(1), 1252(a)(2)(B), and 1252(b)(9), drastically changed the courts of appeals review. The term "judicial review" and "jurisdiction to review" are now the focus of each of these three provisions. As amended by §306 of IIRIRA, 8 U.S.C. §1252(a)(1) (1994 ed., Supp. V) now provides that, with certain exceptions, including those set out in subsection (b) of the same statutory provision, "[j]udicial review of a final order of removal . . . is governed only by" the Hobbs Act's procedures for review of agency orders in the courts of appeals. Similarly, §1252(b)(9), which addresses the "[c]onsolidation of questions for judicial review," provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." Finally, §1252(a)(2)(B), which concerns "[m]atters not subject to judicial review," states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review --
>
> (i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A,

240B, or 245 [*8 USCS § § 1182*(h), 1182(i), 1229b, 1229c, or 1255], or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title [*8 USCS § § 1151* et seq.] to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [*8 USCS § 1158*(a)].

Congress does not explicitly state that the courts of appeals are divested of jurisdiction to review the denial of relief under INA § 244(a), 8 U.S.C. § 1254(a) (repealed). The transitional rules of the IIRIRA, which apply to those cases in which proceedings commenced prior to April 1, 1997, and a final order of deportation or exclusion order was filed after October 30, 1996, state that there is no review of discretionary decisions under INA § 244 wherein the BIA has addressed the merits of the alien's request for relief. *Kalaw v. INS*, 133 F. 3d 1147, 1150 (9th Cir. 1997).

However, direct judicial review remains over the statutory elements. *Id.* The plain language of IIRIRA precludes the courts of appeals' direct judicial review of the Attorney General's discretionary decisions. However, assessing some of the aspects of statutory eligibility for suspension of deportation requires application of law to factual determinations. There are clearly aspects of statutory eligibility not involving the exercise of discretion wherein judicial review remains.

"Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the

favorable exercise of discretion, on the other hand." *INS* v. *St. Cyr*, 121 S. Ct. 2276 (2001) (*citing* Neuman, 113 Harv. L. Rev., at 1991 (noting the "strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ")). Eligibility that was "governed by specific statutory standards" provided "a right to a ruling on an applicant's eligibility," even though the actual granting of relief was "not a matter of right under any circumstances, but rather is in all cases a matter of grace." *Jay* v. *Boyd,* 351 U. S. 345, 353-354 (1956); *INS* v. *St. Cyr*, 121 S. Ct. 2276 (2001). There are clearly aspects of a denial of a right to a ruling, wherein the BIA's perfunctory decision barely amounts to review.

III. Motions to Reopen

In the present case, the matter concerns whether the courts of appeals have been divested of jurisdiction to review motions to reopen. The granting of a motion to reopen is discretionary. *INS v. Doherty,* 112 S. Ct. 502 U.S. 314 at 724, 1992 U.S. LEXIS 376; *INS v. Rios-Pineda*, 471 U.S 444 at 449, 105 S. Ct. 2098, 85 L. Ed. 2d 452 (1985). Accordingly, the courts of appeals review the BIA's decision to deny Petitioners' motion to reopen only for abuse of discretion. *Doherty,* 112 S. Ct. at 725; *INS v. Abudu,* 485 U.S. 94, 105, 108 S. Ct. 904, 99 L. Ed. 2d 90 (1988); *Wijeratne v. INS,* 961 F.2d 1344, 1348 (7th Cir. 1992). "In this circuit, the BIA does not abuse its discretion and the denial of a motion to reopen will be upheld 'unless it was made without a rational explanation…' *Wijeratne,* 961 F.2d at 1348 *quoting Achacoso-Sanchez v. INS,* 779 F.2d 1260, 1265 (7th Cir. 1985).

The courts of appeals review for an abuse of discretion the BIA's denial of a motion to reopen. *Watkins v. INS*, 63 F.3d 844, 847 (9th Cir. 1995). The BIA abuses its discretion when it "fails to state its reasons and show proper consideration of *all* factors when weighing equities and denying relief." *Id.* at 849 (emphasis added) (quoting *Yepes-Prado v. INS*, 10 F.3d 1363, 1366 (9th Cir. 1993)). "The BIA . . . decides whether an applicant is entitled to a favorable exercise of agency discretion on a case by case basis by 'taking into account the *social* and *humane* considerations presented in an applicant's favor and balancing them against the adverse factors that evidence the applicant's undesirability as a permanent resident.'" *Rashtabadi v. INS*, 23 F.3d 1562, 1570 (9th Cir. 1994) (emphasis added) (quoting *Yepes-Prado v. INS*, 10 F.3d at 1365-66 (9th Cir. 1993)). "In its determination, the BIA must take into account *all* relevant factors." *Arrozal v. INS*, 159 F.3d 429, 431 (9th Cir. 1998).

In the motion to reopen, petitioners presented evidence about their community involvement, the hardship that her deportation would cause their four citizen children's health and well-being, and information concerning the human rights record of the Pakistan. All these factors must be considered by the BIA in exercising its discretionary powers. *Villena v. INS*, 622 F.2d 1352, 1357-60 (9th Cir. 1990); *Tukhowinich v. INS*, 64 F.3d 460, 463-64 (9th Cir. 1995). The BIA, however, merely made a cursory and generalized analysis, not even addressing the favorable factors. *Jara-Navarrete v. INS*, 813 F.2d 1340, 1342 (9th Cir. 1986) (holding that the BIA's superficial mentioning of petitioner's favorable factors was an abuse of discretion).

In its order denying petitioners' motion to reopen, the BIA did not base its decision upon a finding that petitioners had not established *prima facie* eligibility for relief under 8 U.S.C. § 1254(a)(1), but rather summarily stated that they did not find reopening warranted. Petitioners attacked rationality of the BIA's exercise of discretion.

Additionally, under IIRIRA's transitional rules, unless an exception applies, the courts of appeals have jurisdiction to consider petitioners' appeal from the BIA's denial of their motion to reopen. *See* IIRIRA § 309(c)(1). The peitioners' appeal was dismissed specifically because the INS invoked § 309(c)(4)(E) of IIRIRA, which precludes an appeal of "any discretionary decision under section . . . 244," citing the Seventh Circuit's decision in *Plich v. INS,* 129 F.3d 969 (7th Cir. 1997). However, the Ninth Circuit has supported a finding that the transitional rules do not deny the courts of appeals jurisdiction over motions to reopen. *Arrozal v. INS*, 159 F3d 429 (9th Cir. 1998); *Sarmadi v. INS,* 121 F.3d 1319 (9th Cir. 1997).

The Ninth Circuit found it had jurisdiction to consider an appeal of a motion to reopen to apply for suspension of deportation because the underlying deportation order, which placed the alien in deportation proceedings, was not based on a section of the Immigration and Nationality Act that was precluded from judicial review. The Ninth Circuit reasoned that:

> [I]n considering Sarmadi's motion to reopen, we pointed out that the motion to reopen was intertwined with the deportation order. *Id.* at 1322.

> Because the deportation order was issued under the moral turpitude section, § 237(a)(2)(A)(ii) of the INA, we concluded that the order denying Sarmadi's motion to reopen also should be treated as an order under that moral turpitude section. *See id.* Thus, we concluded that the AEDPA's limitation against reviewing any final order under the moral turpitude section precluded review of the order denying Sarmadi's motion to reopen. *Id.* at 1321.
>
> In this case, Yehdego's deportation order was issued under § 241(a)(2) of the INA for overstaying her visa. Following the rationale of *Sarmadi,* the BIA's order denying Yehdego's motion to reopen should be treated as an order under § 241(a)(2), the overstay section of the INA. But § 241 is not one of the INA sections listed in § 309(c)(4)(E) of the IIRIRA, the section that precludes an appeal from certain discretionary decisions. *Arrozal v. INS*, 159 F.3d 429, 431 (9th Cir. 1998).

This argument most certainly applies to petitioners in the present case. Hence, the courts of appeals do have jurisdiction under IIRIRA's transitional rules to hear petitioners' appeal from the BIA's denial of their motion to reopen.

Additionally, this case is clearly distinguishable from *Plich v. INS*, 129 F.3d 969 (7th Cir. 1997). According to the Seventh Circuit decision,

> [t]he Pilches did not seek any of the remedies for which judicial review is available; they do not

> contend that they or their children would be persecuted or tortured in Poland. All we have is a standard request for relief on economic grounds. Judicial review has been curtailed to expedite the process... *Id.*.

Petitioners in the present case are seeking review of their motion to reopen, under which review is still available. *Arrozal v. INS*, 159 F.3d 429, 431 (9th Cir. 1998).

IV. Venue

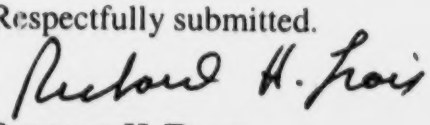
In the Seventh Circuit's divided opinion, Judge Ilana Rovner voted to transfer the petitioners' appeal for the Court of Appeals for the Ninth Circuit. (A5). Petitioners filed their applications for asylum and suspension of deportation, and their case was originally decided by an IJ in Los Angeles, California.

If the Seventh Circuit found that it did not have jurisdiction to consider petitioners' appeal, the case should have been transferred to the Court of Appeals for the Ninth Circuit, where jurisdiction was proper under INA § 309(c)(4)(D), 8 U.S.C. § 1252(b)(2), as "the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge completed the proceedings," and as argued by the government's attorney in their Motion to Dismiss and in the Alternative to Transfer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.



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RELEVENT STATUTORY PROVISIONS

8 U.S.C § 1252. Judicial review of orders of removal

(a) Applicable provisions.

(1) General orders of removal. Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1) [*8 USCS § 1225*(b)(1)]) is governed only by chapter 158 of title 28 of the United States Code [*28 USCS § § 2341* et seq.], except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.

(A) Review relating to section 235(b)(1). Notwithstanding any other provision of law, no court shall have jurisdiction to review--

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1) [*8 USCS § 1225*(b)(1)],

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B) [*8 USCS § 1225*(b)(1)(B)], or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 235(b)(1) [*8 USCS § 1225*(b)(1)].

8 U.S.C § 1252 *Continued.*

(B) Denials of discretionary relief. Notwithstanding any other provision of law, no court shall have jurisdiction to review--

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [*8 USCS § § 1182*(h), 1182(i), 1229b, 1229c, or 1255], or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title [*8 USCS § § 1151* et seq.] to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [*8 USCS § 1158*(a)].

(C) Orders against criminal aliens. Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D) [*8 USCS § § 1182*(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D)], or any offense covered by section 237(a)(2)(A)(ii) [*8 USCS § 1227*(a)(2)(A)(ii)] for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i) [*8 USCS § 1227*(a)(2)(A)(i)].

(3) Treatment of certain decisions. No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 240(c)(1)(B) [*8 USCS § 1229a*(c)(1)(B)].

United States Court of Appeals ts
For the Seventh Circuit
Chicago, Illinois 60604

December 31, 2003

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

MOHAMMAD KHAN and ERUM SYEDA Petitioners, No. 03-2743 v. JOHN D. ASHCROFT, United States Attorney General, Respondent.	]]]]]]]	Petition for Review of an Order of the Board of Immigration Appeals Nos. A75-252-009 A75-252-008

Upon consideration of the MOTION TO RECONSIDER, filed on December 15, 2003, by counsel for the petitioner,

IT IS ORDERED that the motion be DENIED.

United States Court of Appeals kh/kl
For the Seventh Circuit
Chicago, Illinois 60604

November 13, 2003

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

MOHAMMAD KHAN and ERUM SYEDA Petitioners, No. 03-2743 v. JOHN D. ASHCROFT, United States Attorney General, Respondent.	]]]]]]]	Petition for Review of an Order of the Board of Immigration Appeals Nos. A75-252-009 A75-252-008

The following are before the court:

1. MOTION FOR STAY OF REMOVAL, filed on September 23, 2003, by counsel for the petitioners.

2. RESPONDENTS' MOTION TO DISMISS AND IN THE ALTERNATIVE TO TRANSFER, AND RESPONSE TO MOTION FOR STAY OF REMOVAL, filed on October 9, 2003, by counsel.

3. PETITIONERS' RESPONSE TO RESPONDENT'S MOTION TO DISMISS, TRANSFER AND RESPONSE TO STAY OF REMOVAL, filed on October 22, 2003, by counsel.

IT IS ORDERED that #1 be DENIED, and #2 is GRANTED, to the extent that petitioners' Petition for Review is DISMISSED. Courts do not have jurisdiction to review discretionary denials of applications for suspension of deportation. *See Plich v. INS*, 129 F.3d 969 (7th Cir. 1997).

*Judge Rovner dissents and voted to transfer the petitioners' appeal to the Court of Appeals for the Ninth Circuit.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 24, 2003

Before

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

MOHAMMAD KHAN and ERUM SYEDA Petitioners, No. 03-2743 v. JOHN D. ASHCROFT, United States Attorney General, Respondent.	]]]]]]]	Petition for Review of an Order of the Board of Immigration Appeals Nos. A75-252-009 A75-252-008

Upon consideration of the MOTION FOR STAY OF REMOVAL, filed on September 23, 2003, by counsel for the petitioners,

IT IS ORDERED that the removal of the petitioners is temporarily STAYED pending the resolution of the motion for stay of removal.

IT IS FURTHER ORDERED that the respondent file a response to the motion by October 8, 2003.

Department of Justice
Executive Office for Immigration Review
Office of the Clerk

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Name: KHAN, MOHAMMAD A75-252-008
Riders: A75-252-009

Date of this notice: 06/02/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

s/_____
Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-252-009 – LOS ANGELES

Date: JUN 02 2003

In re: SYEDA, ERUM

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Trais, Richard H., Esquire

ON BEHALF OF DHS: Lee P. Crystal

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated January 22, 2003. We have considered the respondent's motion papers but do not find that reopening of the proceedings is warranted. Accordingly, the motion is denied.

s/_____
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-252-008 – LOS ANGELES
Date: JUN 02 2003

In re: KHAN, MOHAMMAD

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Trais, Richard H., Esquire

ON BEHALF OF DHS: Lee P. Crystal

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated January 22, 2003. We have considered the respondent's motion papers but do not find that reopening of the proceedings is warranted. Accordingly, the motion is denied.

s/_____
FOR THE BOARD

A-10

Department of Justice
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Name: KHAN, MOHAMMAD A75-252-008
Riders: A75-252-009

Date of this notice: 01/22/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

s/_____
Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-252-009 – LOS ANGELES
Date: JAN 22 2003

In re: SYEDA, ERUM

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jambusaria, Haresh Esq

ON BEHALF OF SERVICE: JoAnn M. Patel, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the

alien is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director, and in the event of failure to depart, the alien shall be deported as provided by the Immigration Judge's order.

s/_____
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A75-252-008 – LOS ANGELES
Date: JAN 22 2003

In re: KHAN, MOHAMMAD

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jambusaria, Haresh Esq

ON BEHALF OF SERVICE: JoAnn M. Patel, Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the

alien is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director, and in the event of failure to depart, the alien shall be deported as provided by the Immigration Judge's order.

s/_____
FOR THE BOARD

(2)

Supreme Court, U.S.
FILED
JUL 21 2004
OFFICE OF THE CLERK

No. 03-1450

In the Supreme Court of the United States

MOHAMMAD KHAN AND ERUM SYREDA, PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioners' petition to review the Board of Immigration Appeals' denial of their motion to reopen immigration proceedings.

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In the Supreme Court of the United States

No. 03-1450

MOHAMMAD KHAN AND ERUM SYREDA, PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-5a) is unreported. The orders of the Board of Immigration Appeals (Pet. App. 8a, 9a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2003. A motion for reconsideration was denied on December 31, 2003 (Pet. App. 3a). The petition for a writ of certiorari was filed on March 29, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Before the amendments to the Immigration and Nationality Act (INA) that were enacted by the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident under 8 U.S.C. 1254(a) (1994). Relief was available in the discretion of the Attorney General. To qualify for consideration, the alien was required to demonstrate, *inter alia*, that his deportation would result in "extreme hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) (1994). The alien was also required to satisfy a continual physical presence requirement and establish good moral character. *Ibid.* IIRIRA repealed 8 U.S.C. 1254(a) (1994), see Pub. L. No. 104-208, § 308(b)(7), 110 Stat. 3009-615, and enacted new provisions containing stricter criteria for obtaining discretionary relief, 8 U.S.C. 1229b(b)(1). See *Kalaw* v. *INS*, 133 F.3d 1147, 1150-1151 (9th Cir. 1997).[1]

Judicial review of the Attorney General's decision on an application for suspension of deportation under former 8 U.S.C. 1254(a) (1994) arose under 8 U.S.C. 1105a(a) (1994). IIRIRA repealed that provision and enacted a new judicial review provision, 8 U.S.C. 1252 (Supp. III 1997), which became effective on April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625. IIRIRA sets forth transitional rules that govern judicial review of immigration proceedings where the proceedings

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[1] IIRIRA generally replaced "deportation" proceedings in the INA with "removal" proceedings. Accordingly, 8 U.S.C. 1229b(b)(1), the provision that replaced former 8 U.S.C. 1254(a)(1) (1994) (as well as other provisions of the INA), permits "cancellation of removal" by the Attorney General rather than "suspension of deportation."

were underway before IIRIRA's effective date of April 1, 1997, and no final order was entered by October 30, 1996. IIRIRA § 309(c), 110 Stat. 3009-625. Those transitional rules preclude judicial review of the Attorney General's discretionary determinations under, *inter alia*, former 8 U.S.C. 1254(a) (1994). IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626.

2. Petitioners, husband and wife, are natives and citizens of Pakistan. Petitioner Khan was admitted to the United States on March 22, 1986, as a nonimmigrant student. Certified Administrative Record (CAR) 927. Petitioner Syreda was admitted on August 9, 1989, as a nonimmigrant visitor. CAR 1013. On January 8, 1997, petitioners were placed in deportation proceedings because Khan failed to maintain his nonimmigrant status and Syreda overstayed her visa. CAR 929, 1015. Petitioners applied for asylum and for suspension of deportation under former 8 U.S.C. 1254(a)(1) (1994), claiming that deportation would result in extreme hardship. CAR 734, 741.

On December 1, 1998, an immigration judge (IJ) found petitioners deportable, denied them asylum and suspension of deportation, but granted them voluntary departure. CAR 421-445. With respect to the denial of suspension of deportation, the IJ found that petitioners satisfied the requirements concerning continuous physical presence and good moral character. CAR 438, 441. The IJ ruled, however, that petitioners had failed to establish that the hardship to them and to their United States citizen children if deported to Pakistan would amount to the "extreme hardship" necessary to obtain relief. CAR 438-444.

On January 22, 2003, the Board of Immigration Appeals (BIA) affirmed the IJ's decision without opinion. Pet. App. 11a-12a, 13a-14a. The IJ's decision therefore

became the final agency determination. *Id.* at 11a, 13a; see 8 C.F.R. 3.1(e)(4). Petitioners did not seek judicial review of the final agency determination.

3. On February 20, 2003, petitioners filed a motion with the BIA to reopen their deportation proceedings. CAR 20-30. Petitioners' motion did not seek reexamination of the determination that they were deportable or of the denial of their applications for asylum. The motion instead was limited to seeking reevaluation of their applications for suspension of deportation. Petitioners alleged that changed circumstances established the requisite extreme hardship, including the birth of two additional United States citizen children, the absence of family in Pakistan, the recent presence of all family members in the United States, their increased economic and community ties in the United States, the poor economic and educational opportunities for their children in Pakistan, and changed country conditions in Pakistan.

The government opposed petitioners' motion to reopen on the ground that the evidence offered in support of the motion was not material evidence with respect to the extreme hardship determination. CAR 4. On June 2, 2003, the BIA issued per curiam orders denying petitioners' motion to reopen. Pet. App. 8a, 9a. The orders state that, having "considered [petitioners'] motion papers [we] do not find that reopening of the proceedings is warranted." *Ibid.*

4. On July 1, 2003, petitioners filed a petition for review in the United States Court of Appeals for the Seventh Circuit, seeking review of the BIA's denial of their motion to reopen. On October 8, 2003, the government moved to dismiss the petition for review, arguing that the transitional rules enacted by IIRIRA preclude judicial review of the denial of suspension of

deportation for failure to establish extreme hardship. See IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626. The government argued in the alternative that, under 8 U.S.C. 1252(b)(2), the petition for review should be transferred to the United States Court of Appeals for the Ninth Circuit because the proceedings before the IJ had taken place in Los Angeles, California.

On November 13, 2003, the court of appeals issued an unpublished order granting the government's motion to dismiss the petition for review. Pet. App. 4a-5a. The order states that "[c]ourts do not have jurisdiction to review discretionary denials of applications for suspension of deportation." *Id.* at 5a. Judge Rovner dissented and would have transferred the case to the Court of Appeals for the Ninth Circuit. *Ibid.*

ARGUMENT

Petitioners argue that the court of appeals erred in concluding that it lacked jurisdiction to review the BIA's denial of their motion to reopen. That contention lacks merit and does not warrant review.

1. Because petitioners' deportation proceedings commenced before April 1, 1997, and no final order had been issued by October 30, 1996, judicial review in their immigration proceedings is governed by IIRIRA's transitional rules. Those rules provide that "there shall be no appeal of any discretionary decision under section * * * 244" of the INA, IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626, including the discretionary denial of an application for suspension of deportation under former 8 U.S.C. 1254(a)(1) (1994). The courts of appeals have uniformly held that the transitional rules bar direct review of the denial of an application for suspension of deportation for failure to establish extreme hardship. *Mendez- Moranchel* v. *Ashcroft*, 338 F.3d 176, 179 (3d

Cir. 2003); *Valenzuela-Alcantar* v. *INS*, 309 F.3d 946, 949 (6th Cir. 2002); *Kalkouli* v. *Ashcroft*, 282 F.3d 202, 204 (2d Cir. 2002); *Okpa* v. *United States INS*, 266 F.3d 313, 317 (4th Cir. 2001); *Al Najjar* v. *Ashcroft*, 257 F.3d 1262, 1298 (11th Cir. 2001); *Escalera* v. *INS*, 222 F.3d 753, 755 (10th Cir. 2000); *Bernal-Vallejo* v. *INS*, 195 F.3d 56, 62 (1st Cir. 1999); *Moosa* v. *INS*, 171 F.3d 994, 1013 (5th Cir. 1999); *Kalaw* v. *INS*, 133 F.3d 1147, 1152 (9th Cir. 1997); *Skutnik* v. *INS*, 128 F.3d 512, 514 (7th Cir. 1997).

Petitioners therefore could not have obtained direct review of the agency's adverse determination on extreme hardship. In this case, after the BIA entered that adverse determination, petitioners filed a motion with the BIA to reopen their immigration proceedings, arguing that changed circumstances warranted reevaluation of whether they satisfied the extreme hardship requirement. Petitioners then sought judicial review of the BIA's denial of their motion to reopen.

In those circumstances, the court of appeals correctly dismissed petitioners' appeal for lack of jurisdiction. Because the court would have lacked jurisdiction to review the denial of petitioners' applications for suspension of deportation, the court necessarily also lacked jurisdiction to review the denial of a motion to reopen seeking reexamination of the same applications for suspension of deportation. A contrary conclusion would allow an alien easily to circumvent the statutory prohibition against direct review of an adverse determination on extreme hardship simply by filing a motion to reopen the proceedings for a reexamination of extreme hardship and then seeking judicial review of the denial of that motion.

Petitioners argue (Pet. 11-12) that the court of appeals' decision conflicts with the Ninth Circuit's deci-

sion in *Arrozal* v. *INS*, 159 F.3d 429 (9th Cir. 1998). In that case, the alien was ordered deported for overstaying her visa. She then filed a motion to reopen the proceedings to permit her to file an application for suspension of deportation under former 8 U.S.C. 1254(a) (1994) on grounds of extreme hardship. After the BIA denied her motion to reopen, she sought review in the Ninth Circuit. The Ninth Circuit held that IIRIRA's transitional rules did not preclude review of the BIA's denial of the motion to reopen, ruling that the denial was not a "decision under" former 8 U.S.C. 1254(a) (1994) within the meaning of IIRIRA's transitional rules, IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626. The court reasoned that, because the alien's deportation order was issued under Section 241(a)(2) of the INA for overstaying her visa and the motion to reopen "was intertwined with the deportation order", the denial of the motion to reopen "should be treated as an order under § 241(a)(2)" rather than an order under former 8 U.S.C. 1254(a) (1994). *Arrozal*, 159 F.3d at 432. And because IIRIRA's transitional rules did not preclude review of orders under Section 241(a)(2), the court concluded, there was no bar to review of the BIA's denial of the motion to reopen. *Ibid.*

It is not clear that the Ninth Circuit would conclude that it has jurisdiction under IIRIRA's transitional rules on the facts of this case. In *Arrozal*, the alien filed a motion to reopen her proceedings to permit her to file an application for suspension of deportation on grounds of extreme hardship. At the time of her motion to reopen, there had been no agency determination addressing the merits of her application for suspension of deportation and no discretionary determination that she failed to establish extreme hardship. In this case, by contrast, petitioners moved to reopen proceedings

that had already culminated in the denial of suspension of deportation for failure to establish extreme hardship; and the sole ground for reopening the proceedings cited by the motion was to obtain a reevaluation of the adverse determination on extreme hardship. The BIA therefore characterized petitioners' motion as seeking to "reopen our decision dated January 22, 2003," Pet. App. 8a, 9a, a decision that constituted a final agency determination that petitioners had failed to establish extreme hardship. This case thus even more squarely implicates the statutory prohibition against direct review of discretionary determinations concerning extreme hardship.

Insofar as *Arrozal* would permit direct review in the circumstances of this case, however, *Arrozal* was wrongly decided. IIRIRA cannot be construed to have barred direct review of a discretionary decision concerning extreme hardship while at the same time permitting review of the denial of a motion to reopen designed solely to introduce additional evidence of extreme hardship. Any such result would be particularly unwarranted in light of the fact that decisions whether to grant a motion to reopen also lie within the discretion of the Attorney General. As this Court has explained, the "Attorney General has 'broad discretion' to grant or deny such motions." *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (quoting *INS* v. *Rios-Pineda*, 471 U.S. 444, 449 (1985)).

In any event, the court of appeals' unpublished summary order has no precedential effect, and any questions concerning the scope of judicial review under IIRIRA's transitional rules are of little and diminishing practical significance. For removal proceedings commenced after IIRIRA's effective date of April 1, 1997, judicial review of the denial of discretionary relief is

governed by 8 U.S.C. 1252(a)(2)(B)(i). Under that provision, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under," *inter alia*, 8 U.S.C. 1229b(b)(1), the provision that replaced former 8 U.S.C. 1254(a)(1) (1994). Whereas the transitional rules precluded review of a "decision under" former 8 U.S.C. 1254(a) (1994), IIRIRA § 309(c)(4)(E), 110 Stat. 3009-626, the permanent provisions more broadly preclude review of "any judgment regarding the granting of relief under" 8 U.S.C. 1229b. 8 U.S.C. 1252(a)(2)(B)(i). No court of appeals has yet addressed whether, and to what extent, 8 U.S.C. 1252(a)(2)(B)(i) permits judicial review of the denial of a motion to reopen where the motion seeks reexamination of an adverse agency determination on extreme hardship.[2] Cf. *Medina-Morales* v. *Ashcroft*, 371 F.3d 520, 525-527 (9th Cir. 2004) (relying on *Arrozal* and holding that 8 U.S.C. 1252(a)(2)(B)(i) does not preclude review of a denial of a motion to reopen to allow the alien to seek adjustment of status when the agency has not ruled on a petition for adjustment of status).

2. Petitioners also argue (Pet. 13) that, instead of dismissing their petition for review for lack of jurisdiction, the court of appeals should have transferred the appeal to the Ninth Circuit because the proceedings before the IJ were conducted in Los Angeles, California. See 8 U.S.C. 1252(b)(2). There is no warrant for reviewing petitioners' fact-bound contention on venue

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[2] An alien applying for suspension of deportation under former 8 U.S.C. 1254(a)(1) (1994) was required to demonstrate, *inter alia*, "extreme hardship," but an alien seeking cancellation of removal under 8 U.S.C. 1229b(b)(1) must demonstrate, *inter alia*, that "removal would result in exceptional and extremely unusual hardship."

because the court of appeals did not reach the issue. In addition, petitioners elected to seek judicial review in the Seventh Circuit rather than the Ninth Circuit, and when the government moved to dismiss petitioners' appeal or in the alternative to transfer the proceedings to the Ninth Circuit, petitioners responded that the proceedings should remain in the Seventh Circuit. See Petitioners' Response to Respondent's Motion to Dismiss, Transfer and Response to Stay of Removal (filed Oct. 22, 2003). There is no basis in these circumstances to review petitioners' current contention that the Seventh Circuit should have transferred the proceedings to the Ninth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2004

(3)

Supreme Court, U.S
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No. 03-1450

In the Supreme Court of the United States

MOHAMMAD KHAN AND ERUM SYEDA,
Petitioners

v.

JOHN D. ASHCROFT,
UNITED STATES ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 03-1450

MOHAMMAD KHAN AND ERUM SYEDA,
Petitioners

v.

JOHN D. ASHCROFT,
UNITED STATES ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Petitioners' opening brief argued that the court of appeals erred in concluding that they were barred from seeking judicial review of the BIA's dismissal of their motion to reopen. Petitioners contend that the United States Court of Appeals for the Seventh Circuit's decision to dismiss their petition for review relying on *Plich v. INS* conflicts with the decision of the Ninth Circuit Court of Appeals in *Arrozal v. INS,* 159 F.3d 429, 431 (9th Cir. 1998).

Moreover, Petitioners argued that if the Seventh Circuit Court of Appeals found that it did not have jurisdiction to consider the matter, the case should have been transferred to the Court of Appeals for the Ninth Circuit, where jurisdiction was proper under INA § 309(c)(4)(D), 8 U.S.C. § 1252(b)(2), as "the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge completed the proceedings." Both Petitioners and the government's attorney, in their Motion to Dismiss and in the Alternative to Transfer, agreed that a transfer would be proper in this case.

A. Judicial review of the motion to reopen is not precluded.

Congress has not divested the Courts of Appeals of jurisdiction to review a denial of all motions to reopen. Petitioner's contended that the Court did not address the merits of their request for relief pursuant to a provision of the INA established as discretionary by §309(c)(4)(E), and therefore review remains available.

Despite Respondent's contention to the contrary, this conclusion is consistent with the Ninth Circuit's holding in Arrozal v. INS 159 F.3d 429 (9th Cir. 1998) that §309(c)(4)(E) did not preclude review of a motion to reopen. In *Arrozal*, the merits of the denial of the motion to reopen did not involve a decision by the Board involving any of the discretionary provisions set forth in §309(c)(4)(E); rather, it involved a deportation order under INA § 241(a)(2). In the present case, the male petitioner was charged under Section 241(a)(1)(c)(1) of the

Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1), for failing to comply with the conditions of the nonimmigrant status under which he was admitted. The female petitioner was charged under INA § 241(a)(1)(B) for remaining in the United States longer than permitted. The denial of the motion to reopen by the Board of Immigration Appeals involved the underlying deportation orders without even considering the merits of Petitioners' motion, not one of the listed discretionary provisions in §309(c)(4)(E).

Congress does not explicitly state that the courts of appeals are divested of jurisdiction to review the denial of relief under INA § 244(a), 8 U.S.C. § 1254(a) (repealed). The transitional rules of the IIRIRA, which apply to those cases in which proceedings commenced prior to April 1, 1997, and a final order of deportation or exclusion order was filed after October 30, 1996, state that there is no review of discretionary decisions under INA § 244 wherein the BIA has addressed the merits of the alien's request for relief. *Kalaw v. INS*, 133 F. 3d 1147, 1150 (9th Cir. 1997).

Petitioners argued, however, that direct judicial review remains over the statutory element and that, while the plain language of IIRIRA precludes the courts of appeals' direct judicial review of the Attorney General's discretionary decisions, assessing some of the aspects of statutory eligibility for suspension of deportation requires application of law to factual determinations. There are clearly aspects of statutory eligibility not involving the exercise of discretion wherein judicial review remains.

Additionally, Petitioners argued that the Courts of Appeals had jurisdiction to review the decision of the Board of Immigration Appeals for an abuse of discretion. "In this circuit, the BIA does not abuse its discretion and the denial of a motion to reopen will be upheld 'unless it was made without a rational explanation...' *Wijeratne,* 961 F.2d at 1348 *quoting Achacoso-Sanchez v. INS,* 779 F.2d 1260, 1265 (7th Cir. 1985). BIA abuses its discretion when it "fails to state its reasons and show proper consideration of *all* factors when weighing equities and denying relief." *Id.* at 849 (emphasis added) (quoting *Yepes-Prado v. INS,* 10 F.3d 1363, 1366 (9th Cir. 1993)). All the factors presented by Petitioners in their motion to reopen must be considered by the BIA in exercising its discretionary powers. *Villena v. INS,* 622 F.2d 1352, 1357-60 (9th Cir. 1990); *Tukhowinich v. INS,* 64 F.3d 460, 463-64 (9th Cir. 1995). As stated in Petitioners' opening brief, the BIA merely made a cursory and generalized analysis, not even addressing the favorable factors. *Jara-Navarrete v. INS,* 813 F.2d 1340, 1342 (9th Cir. 1986) (holding that the BIA's superficial mentioning of petitioner's favorable factors was an abuse of discretion).

These provisions do not interdict the Courts of Appeals consideration of the BIA's initial denial of Petitioners' applications for suspension of deportation or their motion to reopen.

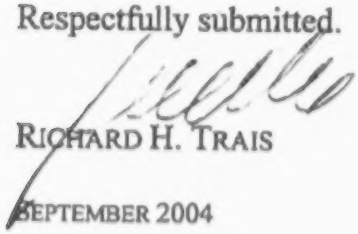
B. Petitioners did not oppose a change of venue to the Ninth Circuit.

Respondents contend that Petitioners opposed a change of venue to the Ninth Circuit. This contention is without merit, as Petitioners did not oppose a change of venue.

CONCLUSION

For the foregoing reasons and the reasons stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.



RICHARD H. TRAIS

SEPTEMBER 2004